NO. 86084-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH McENROE,

Appellant.

INTERLOCUTORY APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Whether this Court should announce a procedure whereby a party may withdraw materials submitted in support of a motion if the trial court denies the party's motion to seal those materials.

B. STATEMENT OF THE CASE

Appellant McEnroe and his co-defendant, Michele Anderson, are each charged with six counts of aggravated first-degree murder for the December 24, 2007 killings of six members of Anderson's family. The State has filed a notice of intent to seek the death penalty as to each defendant.

In April 2011, the trial court granted the State's unopposed motion to sever the defendants for trial. The severance was requested because the defendants' lengthy, detailed confessions could not be sufficiently redacted to comport with the dictates of the Sixth Amendment. The State also proposed setting McEnroe's trial first because his attorneys had been representing him since the beginning of the case, whereas Anderson's attorneys had been representing her for a comparatively short time. McEnroe objected on grounds that evidence germane to his mitigation strategy would not become available until after Anderson's trial. The trial court

then asked for briefing from each defendant as to why his or her case should proceed after the other.

In response, in May 2011, McEnroe filed a "Motion to Waive LGR 15 for the Purpose of Filing Defendant's Motion to Seal Defendant's Motion to Have His Trial After Michele Anderson's Trial is Complete." CP 1-11. The gist of this motion is that McEnroe wants to provide the trial court with information ex parte and under seal regarding "the defense theory of his mitigation case" in order to support his position that Anderson should be tried first. However, if the trial court were to deny McEnroe's motion to seal this information, McEnroe wants to withdraw these materials from the record rather than allowing the trial court to file them in accordance with KCLGR 15. CP 1-11.

Before receiving or considering McEnroe's motion to be tried last or any supporting materials, and prior to determining whether a motion to seal these materials should be granted, the trial court ruled that the requirements of KCLGR 15 would not be waived and that GR 15 does not provide for a procedure whereby materials may be withdrawn in the event a motion to seal is denied.[1]

[1] Copies of GR 15 and KCLGR 15 are attached for the Court's convenience.

CP 12-16. McEnroe sought and received discretionary and direct review of that ruling, and now asks this Court to approve a procedure whereby materials may be withdrawn rather than filed in the public record if a motion to seal is denied.

C. ARGUMENT

THE PROCEDURE PROPOSED BY MCENROE CONFLICTS WITH THE CONSTITUTIONAL PRINCIPLE THAT COURT PROCEEDINGS AND RECORDS ARE PRESUMPTIVELY OPEN TO THE PUBLIC.

McEnroe argues that the trial court erred in ruling that GR 15 does not contemplate that materials may be withdrawn if a motion to seal is denied and that the requirements of KCLGR 15 should be waived. However, controlling case law holds that "court records" are presumptively open for public inspection, and include anything a court considers in making a decision on a substantive motion. Therefore, the trial court in this case was correct in determining that anything McEnroe may submit for consideration constitutes a "court record" that must be filed if a motion to seal documents related to McEnroe's substantive motion to be tried after Anderson is denied. Moreover, given the constitutional importance of open court records, the trial court did not abuse its discretion in ruling that the requirements of KCLGR 15 should not be waived.

As McEnroe observes, this may give rise to a difficult tactical choice in certain circumstances. More specifically, a party who wants the court to consider sensitive materials that do not meet the Ishikawa[2] standards for sealing must make a tactical choice between not submitting the materials at all, submitting a limited subset of materials, or having the materials become public. Therefore, McEnroe urges this Court to approve a procedure whereby materials submitted in support of a motion may be withdrawn from the record after a court determines they do not meet the Ishikawa standards.

This Court should be reluctant to create such a procedure, given the importance of open court proceedings and court records under the Washington Constitution, and the danger that such an exception would swallow the rule. These concerns are particularly important in a capital case such as this, where the interests of the public and the press are especially keen.

The presumption of open and public court proceedings appears in the Washington Constitution, which provides: "Justice in all cases shall be administered openly, and without unnecessary

[2] Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982).

delay." Const. art. I, § 10. This provision "guarantees the public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases." Tacoma News, Inc. v. Cayce, 172 Wn.2d 58, 256 P.3d 1179, 1184 (2011) (quoting Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004)). This Court has emphasized the importance of the presumption of open proceedings in no uncertain terms:

> The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history. The right of the public, including the press, to access trials and court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified.

Dreiling, 151 Wn.2d at 903-04.

"While openness is presumed, it is not absolute." Cayce, 172 Wn.2d at 1184. But in light of the importance of open proceedings, this Court has made clear that the proponent of closing a courtroom or sealing a court document must show that the five Ishikawa factors have been satisfied: 1) the proponent must make a showing of need to protect an important interest; 2) anyone present when the motion is made must be given the

opportunity to object; 3) the closure or sealing must be the least restrictive means necessary to protect the threatened interest; 4) the court must weigh the competing interests of the parties and the public; and 5) the closure or sealing order must be no broader in scope and duration than necessary. Rufer v. Abbott Laboratories, 154 Wn.2d 530, 543 n.7, 114 P.3d 1182 (2005).

Under the first Ishikawa factor (*i.e.*, the showing of need for closure or sealing), the standard differs when the interest threatened is a criminal defendant's right to a fair trial. When a defendant's Sixth Amendment right to a fair trial is at stake, the defendant must show a "likelihood of jeopardy" to his or her right to a fair trial in order to justify the closure or sealing. Ishikawa, 97 Wn.2d at 37 (quoting Federated Publications, Inc. v. Kurtz, 94 Wn.2d 51, 62, 615 P.2d 440 (1980)). But if a different interest is at stake, the proponent of closure or sealing must demonstrate both that the interest is important and that the threat to that interest is serious and imminent. Ishikawa, at 37. In other words, a more lenient standard applies when a defendant's right to a fair trial is at stake, although the standard is still a demanding one. It is against this constitutional backdrop that this Court must consider McEnroe's rule-based arguments regarding GR 15 and KCLGR 15.

As a preliminary matter, it has yet to be determined whether the materials McEnroe proposes to submit in support of his motion would meet the standards for sealing under Ishikawa. Merely asserting that his pleadings and supporting materials may contain "confidential and privileged information regarding his mitigation strategy" is, by itself, not sufficient to establish a likelihood of jeopardy to McEnroe's right to a fair trial as required.[3] The State has been silent on this point until now, because the trial court in this case has been very diligent in applying the Ishikawa standards to requests for sealing or closure and has demonstrated a strong preference for alternatives to sealing or closure whenever possible. In addition, the public and the press have not yet been given the opportunity to object under the second Ishikawa factor, and it

[3] As an aside, McEnroe states that he is not required to disclose mitigation evidence to the State until just before the penalty phase, citing SPRC 5. Petitioner's Opening Brief, at 5-6. This is not correct. Under SPRC 4, penalty phase evidence should be disclosed prior to the guilt phase, and under SPRC 5, notice of expert testimony regarding the defendant's mental health condition should be disclosed 30 days prior to the beginning of jury selection. Any deviation from these procedures requires a ruling from the trial court.

In any event, based on in-depth conversations with counsel for both defendants before the notices of intent to seek the death penalty were filed, the State is already aware of the general parameters of each defendant's mitigation strategy. Therefore, McEnroe can disclose information about his mitigation strategy to the trial judge -- who presumably knows nothing about that strategy at this point -- without actually revealing any new information to the State.

remains to be seen how the public's interest will weigh against McEnroe's arguments in favor of sealing.

In any event, McEnroe argues that the trial court erred in ruling that GR 15 and KCLGR 15 do not allow a party to submit materials to the trial court with a motion to seal, and then withdraw those materials in the event that the motion to seal is denied. Although the trial court's ruling is ultimately correct – *i.e.,* that a withdrawal procedure such as McEnroe suggests is not contemplated by the rules – the trial court's analysis with respect to GR 15 is flawed, and this Court should take this opportunity to clarify this rule.

In its written order, the trial court concluded that GR 15 contemplates that materials a party seeks to have sealed will already have been "filed" in the public court record. Accordingly, the trial court ruled that KCLGR 15 was created in order to prevent such public disclosure of documents until after the motion to seal has been ruled upon. CP 14-15. The State disagrees that GR 15 mandates public filing prior to a court's consideration of a motion to seal, as this would lead to absurd results.

This Court interprets court rules in a manner that avoids absurd results if possible. State v. Chhom, 162 Wn.2d 451, 464,

173 P.3d 234 (2007). If GR 15 required public filing of materials *before* an accompanying motion to seal was ruled upon in accordance with the Ishikawa factors, any compelling interest sought to be protected by sealing would be vitiated.[4] It is not reasonable to assume that the drafters of GR 15 intended this result. Rather, this Court should clarify that KCLGR 15 merely makes explicit what is already implicit in GR 15 -- that a ruling on a motion to seal will occur before the documents in question will be filed in the event that the motion to seal is denied.

On the other hand, the trial court correctly interpreted KCLGR 15, and its ruling is consistent with Ishikawa and its progeny that the presumption of openness may be overcome only for compelling reasons. Nevertheless, McEnroe argues that the trial court erred in ruling that he cannot withdraw materials from the record if a motion to seal them is denied, and he asks this Court to place its imprimatur on a procedure allowing withdrawal of materials previously submitted to a court. But McEnroe is not

[4] With the advent of electronic filing and the speed with which documents are made available online by the clerk's office, any diligent reporter or member of the public could easily obtain copies of sensitive materials before a motion to seal was ruled upon by the trial court in most instances. It should go without saying that documents in the public domain can be quickly and widely disseminated in this electronic age.

correct that the trial court erred; thus, this Court would have to create the procedure necessitated by the issue McEnroe raises. This Court should be reluctant to create the procedure proposed by McEnroe, which could be subject to abuse, lead to unintended consequences, and undermine the presumption of open courts.

McEnroe's contention that the trial court erred stems from his characterization of the motion to seal and his interpretation of the term "court records." *See* Petitioner's Opening Brief, at 14. McEnroe argues that documents submitted pursuant to a motion to seal "are nothing more than 'working papers'" under GR 15, and that they do not become "court records" "unless and until such time as the moving party elects to pursue the primary motion and have the sensitive documents considered by the court despite not being sealed." Petitioner's Opening Brief, at 14. But this characterization of the motion to seal is artificial because the merit of the motion to seal depends critically upon the nature of the underlying substantive motion. Indeed, the motion to seal cannot be decided without careful balancing of the public's right to know what is being litigated versus the moving party's interest in secrecy. Thus, it is plainly incorrect to suggest that a motion to seal could be submitted

and decided in a vacuum without considering the purpose and merit of the substantive motion that ultimately must be decided.

Moreover, McEnroe's interpretation of the term "court records" conflicts with controlling authority from this Court. In Rufer, this Court unambiguously held that "court records" are presumptively open for public inspection under the Washington Constitution and include "all records the court has considered in making *any* ruling, whether 'dispositive' or not." Rufer, 154 Wn.2d at 549 (emphasis in original). Accordingly, this Court further held that anything submitted "in anticipation of a court decision" may be sealed only if the Ishikawa factors are satisfied. Id.

A trial court's ruling on a motion to seal documents a party wishes to submit in support of a substantive motion certainly qualifies as "*any* ruling" under Rufer. Indeed, if materials submitted with a motion to seal did not qualify as "court records," there would be no need to apply the Ishikawa factors at all. In sum, this Court's jurisprudence supports the trial court's conclusion that if a motion to seal materials supporting a substantive motion is denied, the materials submitted and considered by the court are "court records" that must be filed in the court record and made available for public inspection, as is provided by KCLGR 15.

A holding that documents submitted in support of a substantive motion are "court records" is very narrow, and implicates only motions to seal documents related to a substantive motion to be decided by the trial court, whether dispositive or not. Such a holding does not require this Court to hold that sensitive materials may be returned if the substantive motion itself is withdrawn, as McEnroe obviously does not intend to withdraw his motion to be tried after Anderson. Nor does the State's proposed holding require this Court to resolve the question of whether materials submitted to a court as true working papers (*e.g.*, discovery materials in a civil suit for damages) must be subject to the Ishikawa test. *See* Dreiling, at 909-10 (distinguishing between documents produced during discovery and documents filed in support of a motion), and Foltz v. State Farm Mut. Auto Ins. Co., 331 F.3d 1122 (9th Cir. 2003) (same). This case also does not present the question of whether materials may be sealed when they were never considered by the trial court in the first instance. *See, e.g.*, Clark v. Smith Bunday Berman Britton, P.S., No. 84903-0 (oral argument scheduled for Oct. 18, 2011).

Because the trial court's ruling is ultimately correct, if there is to be any procedure whereby a party may withdraw materials from

the record if a motion to seal is denied, then this Court must create one. As noted by McEnroe, such a procedure exists in some federal courts. *See* U.S. District Court, Western District, CR 5(g)(5).[5] On the other hand, there is no equivalent to Article I, section 10 in the federal constitution, so federal courts have not confronted a constitutional question in drafting the federal rules. Without sufficient limitations and safeguards, a procedure such as that suggested by McEnroe would invert the constitutional presumption of openness. Accordingly, if a withdrawal procedure is to be created, it would be more appropriate for that procedure to be adopted pursuant to the Court's rulemaking process (with substantial input from the civil bar) rather than in the context of an interlocutory appeal in a criminal case such as this one.

With these considerations in mind, this Court should hold that there are alternatives to creating a withdrawal procedure. First, a party should be required to make the substantive motion first *without* revealing any allegedly sensitive information whenever possible. This condition precedent serves two purposes: 1) if the trial court grants the party's motion, then there will be no need to submit any sensitive materials; and 2) if the trial court decides that

[5] A copy of this rule is also attached for the Court's convenience.

it needs further information, the court can inform the party more precisely what is needed. Second, this Court should hold that a party must be judicious in deciding what further materials to submit. As this Court has already held, parties seeking sealing must choose only necessary and relevant documents to be submitted and sealed. *See* Rufer, at 545 (warning parties not to seek blanket sealing orders). Indeed, rather than submitting discovery or other raw materials to the trial court in support of a motion like this one, in many instances an affidavit from counsel would suffice.[6] Lastly, this Court should hold that running the risk of public disclosure after a proper application of the Ishikawa factors is not a "Hobson's choice," but a tactical decision that a party must make in light of the constitutional presumption of openness.

As noted above, the Court's rulemaking process would allow for more careful consideration and input from all interested stakeholders; an interlocutory appeal in a criminal case is a poor vehicle for creating a new procedure such as that suggested here.

[6] An affidavit would also be far easier for the trial court to redact, if sealing it in its entirety was not warranted.

Indeed, creating a withdrawal procedure in this case would likely lead to unintended consequences. For example, although trial courts are certainly presumed to remain impartial, there is still a risk in a case such as this one that submitting materials highly unfavorable to the co-defendant could potentially taint the judge's view of the co-defendant and the co-defendant's case. Moreover, a withdrawal procedure could be subject to abuse; a party could submit materials knowing they will be withdrawn, yet hoping that the judge will be influenced by them nonetheless. Such "black box" litigation should not be encouraged. Also, such a procedure would undermine the appellate process by preventing a complete record from being made and by potentially injecting error into the case.

As this Court has recognized, the presumption of open court proceedings is crucial "to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust." Dreiling, 151 Wn.2d at 903-04. In this case, McEnroe seeks to shield information not only from public scrutiny, but from the State and his co-defendant as well. Rather than create a mechanism that increases secrecy and

potentially harms the co-defendant, this Court should hold that McEnroe must make the same difficult tactical choice that any other litigant must, *i.e.*, he must carefully consider what materials (if any) to submit in support of his substantive motion and run the risk of public disclosure if he cannot satisfy the Ishikawa standards. If McEnroe is selective, it is highly unlikely that his right to a fair trial will be affected or that the State will learn information about his mitigation strategy that it does not already know.

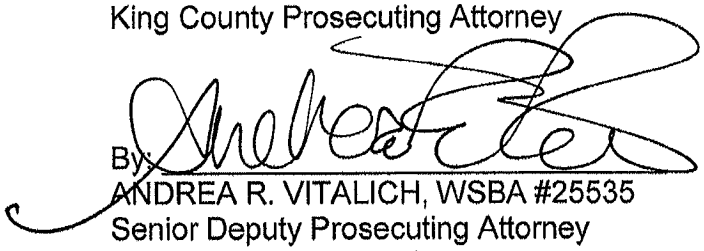
D. CONCLUSION

The State's paramount interest in this case is to ensure that the dictates of the Washington Constitution are followed. The State's interest is also to ensure that both McEnroe and Anderson receive fair and speedy trials, and that any convictions and sentences will withstand the crucible of appellate and collateral review. The Ishikawa standards exist in order to balance privacy interests against the public's right to monitor court proceedings. This Court should be reluctant to upset that balance by creating, ad hoc, the new procedure advocated by McEnroe – a procedure that could undermine the presumption of open court proceedings – when other procedures are adequate to protect his rights.

DATED this 14th day of October, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



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General Rule (GR) 15

C
West's Revised Code of Washington Annotated Currentness
Part I Rules of General Application
General Rules (Gr)
RULE 15. DESTRUCTION, SEALING, AND REDACTION OF COURT RECORDS

(a) Purpose and Scope of the Rule. This rule sets forth a uniform procedure for the destruction, sealing, and redaction of court records. This rule applies to all court records, regardless of the physical form of the court record, the method of recording the court record, or the method of storage of the court record.

(b) Definitions.

(1) "Court file" means the pleadings, orders, and other papers filed with the clerk of the court under a single or consolidated cause number(s).

(2) "Court record" is defined in GR 31(c)(4).

(3) Destroy. To destroy means to obliterate a court record or file in such a way as to make it permanently irretrievable. A motion or order to expunge shall be treated as a motion or order to destroy.

(4) Seal. To seal means to protect from examination by the public and unauthorized court personnel. A motion or order to delete, purge, remove, excise, erase, or redact shall be treated as a motion or order to seal.

(5) Redact. To redact means to protect from examination by the public and unauthorized court personnel a portion or portions or a specified court record.

(6) Restricted Personal Identifiers are defined in GR 22 (b)(6).

(7) Strike. A motion or order to strike is not a motion or order to seal or destroy.

(8) Vacate. To vacate means to nullify or cancel.

(c) Sealing or Redacting Court Records

(1) In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal

case or juvenile proceeding, the court, any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile. **No such notice is required for motions to seal documents entered pursuant to CrR 3.1(f) or CrRLJ 3.1(f).**

(2) After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by **identified compelling** privacy or safety concerns that outweigh the public interest in access to the court record. Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:

(A) The sealing or redaction is permitted by statute; or

(B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or

(C) A conviction has been vacated; or

(D) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or

(E) The redaction includes only restricted personal identifiers contained in the court record; or

(F) Another identified compelling circumstance exists that requires the sealing or redaction.

(3) A court record shall not be sealed under this section when redaction will adequately resolve the issues before the court pursuant to subsection (2) above.

(4) Sealing of Entire Court File. When the clerk receives a court order to seal the entire court file, the clerk shall seal the court file and secure it from public access. All court records filed thereafter shall also be sealed unless otherwise ordered. The existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, names of the parties, the notation "case sealed," the case type and cause of action in civil cases and the cause of action or charge in criminal cases, except where the conviction in a criminal case has been vacated, section (d) shall apply. The order to seal and written findings supporting the order to seal shall also remain accessible to the public, unless protected by statute.

(5) Sealing of Specified Court Records. When the clerk receives a court order to seal specified court records the

clerk shall:

(A) On the docket, preserve the docket code, document title, document or subdocument number and date of the original court records;

(B) Remove the specified court records, seal them, and return them to the file under seal or store separately. The clerk shall substitute a filler sheet for the removed sealed court record. If the court record ordered sealed exists in a microfilm, microfiche or other storage medium form other than paper, the clerk shall restrict access to the alternate storage medium so as to prevent unauthorized viewing of the sealed court record; and

(C) File the order to seal and the written findings supporting the order to seal. Both shall be accessible to the public.

(D) Before a court file is made available for examination, the clerk shall prevent access to the sealed court records.

(6) Procedures for Redacted Court Records. When a court record is redacted pursuant to a court order, the original court record shall be replaced in the public court file by the redacted copy. The redacted copy shall be provided by the moving party. The original unredacted court record shall be sealed following the procedures set forth in (c)(5).

(d) Procedures for Vacated Criminal Convictions. In cases where a criminal conviction has been vacated and an order to seal entered, the information in the public court indices shall be limited to the case number, case type with the notation "DV" if the case involved domestic violence, the adult **or juvenile's name**, and the notation "vacated."

(e) Grounds and Procedure for Requesting the Unsealing of Sealed Records.

(1) Sealed court records may be examined by the public only after the court records have been ordered unsealed pursuant to this section or after entry of a court order allowing access to a sealed court record.

(2) Criminal Cases. A sealed court record in a criminal case shall be ordered unsealed only upon proof of compelling circumstances, unless otherwise provided by statute, and only upon motion and written notice to the persons entitled to notice under subsection (c)(1) of this rule except:

(A) If a new criminal charge is filed and the existence of the conviction contained in a sealed record is an element of the new offense, or would constitute a statutory sentencing enhancement, or provide the basis for an exceptional sentence, upon application of the prosecuting attorney the court shall nullify the sealing order in the prior sealed case(s).

(B) If a petition is filed alleging that a person is a sexually violent predator, upon application of the prosecuting attorney the court shall nullify the sealing order as to all prior criminal records of that individual.

(3) Civil Cases. A sealed court record in a civil case shall be ordered unsealed only upon stipulation of all parties or upon motion and written notice to all parties and proof **that identified compelling circumstances for continued sealing no longer exist**, or pursuant to RCW 4.24 or CR 26(j). If the person seeking access cannot locate a party to provide the notice required by this rule, after making a good faith reasonable effort to provide such notice as required by the Superior Court Rules, an affidavit may be filed with the court setting forth the efforts to locate the party and requesting waiver of the notice provision of this rule. The court may waive the notice requirement of this rule if the court finds that further good faith efforts to locate the party are not likely to be successful.

(4) Juvenile Proceedings. Inspection of a sealed juvenile court record is permitted only by order of the court upon motion made by the person who is the subject of the record, except as otherwise provided in RCW 13.50.010(8) and 13.50.050(23). Any adjudication of a juvenile offense or a crime subsequent to sealing has the effect of nullifying the sealing order, pursuant to RCW 13.50.050(16).

(f) Maintenance of Sealed Court Records. Sealed court records are subject to the provisions of RCW 36.23.065 and can be maintained in mediums other than paper.

(g) Use of Sealed Records on Appeal. A court record or any portion of it, sealed in the trial court shall be made available to the appellate court in the event of an appeal. Court records sealed in the trial court shall be sealed from public access in the appellate court subject to further order of the appellate court.

(h) Destruction of Court Records.

(1) The court shall not order the destruction of any court record unless expressly permitted by statute. The court shall enter written findings that cite the statutory authority for the destruction of the court record.

(2) In a civil case, the court or any party may request a hearing to destroy court records only if there is express statutory authority permitting the destruction of the court records. In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to destroy the court records only if there is express statutory authority permitting the destruction of the court records. Reasonable notice of the hearing to destroy must be given to all parties in the case. In a criminal case, reasonable notice of the hearing must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile.

(3) When the clerk receives a court order to destroy the entire court file the clerk shall:

(A) Remove all references to the court records from any applicable information systems maintained for or by the clerk except for accounting records, the order to destroy, and the written findings. The order to destroy and

the supporting written findings shall be filed and available for viewing by the public.

(B) The accounting records shall be sealed.

(4) When the clerk receives a court order to destroy specified court records the clerk shall:

(A) On the automated docket, destroy any docket code information except any document or sub-document number previously assigned to the court record destroyed, and enter "Ordered Destroyed" for the docket entry;

(B) Destroy the appropriate court records, substituting, when applicable, a printed or other reference to the order to destroy, including the date, location, and document number of the order to destroy; and

(C) File the order to destroy and the written findings supporting the order to destroy. Both the order and the findings shall be publicly accessible.

(5) This subsection shall not prevent the routine destruction of court records pursuant to applicable preservation and retention schedules.

(i) Trial Exhibits. Notwithstanding any other provision of this rule, trial exhibits may be destroyed or returned to the parties if all parties so stipulate in writing and the court so orders.

(j) Effect on Other Statutes. Nothing in this rule is intended to restrict or to expand the authority of clerks under existing statutes, nor is anything in this rule intended to restrict or expand the authority of any public auditor in the exercise of duties conferred by statute.

CREDIT(S)

[Adopted effective September 22, 1989; amended effective September 1, 1995; June 4, 1997; June 16, 1998; September 1, 2000; October 1, 2002; July 1, 2006.]

NOTES OF DECISIONS

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1. In general

Statute permitting a family court judge to close any part of the public files to protect public policy, public morals, or the interests of children did not give trial court discretion, in dissolution of marriage proceeding, to seal all documents related to the parties' children; rather, the same standard applied in family law cases as in other cases, such that record could be sealed only if an interest was sufficiently compelling to override the public's right to the open administration of justice. In re Marriage of R.E. (2008) 144 Wash.App. 393, 183 P.3d 339. Records 32

Insured dentist was afforded due process by his opportunity to present detailed briefing in opposition to insurer's motion to seal its claims manuals that had been used as exhibit at trial of dentist's bad faith action, and dentist was not further entitled to present oral argument. Woo v. Fireman's Fund Ins. Co. (2007) 137 Wash.App. 480, 154 P.3d 236. Constitutional Law 3994; Records 32

Sealing of records, under rule of general application, applies to court records only and must be authorized by statute or required by compelling circumstances. State v. Breazeale (2001) 144 Wash.2d 829, 31 P.3d 1155. Records 32

Court may order a criminal record sealed without express statutory authority under the Rules of General Application, if it finds that compelling circumstances require such action. State v. C.R.H. (2001) 107 Wash.App. 591, 27 P.3d 660. Records 32

Rules of General Application provide a court with authority to seal a criminal record even when the rule conflicts with a particular statute. State v. C.R.H. (2001) 107 Wash.App. 591, 27 P.3d 660. Records 32

Trial courts do not need statutory authority to seal criminal conviction records; sealing of records is procedural. State v. Noel (2000) 101 Wash.App. 623, 5 P.3d 747, reconsideration denied. Criminal Law 1226(2)

2. Factors considered

When a trial court finds that the proponent of a motion to seal court records meets one or more of the listed criteria under the rule, the court can comply with *Ishikawa* by analyzing whether the identified compelling concern also poses a serious and imminent threat. State v. Waldon (2009) 148 Wash.App. 952, 202 P.3d 325, review denied 166 Wash.2d 1026, 217 P.3d 338. Records 32

A trial court must consider five factors in deciding whether a motion to restrict access to court proceedings or records meets constitutional requirements: (1) the proponent of closure and/or sealing must make some showing of the need therefor; (2) anyone present when the closure and/or sealing motion is made must be given an opportunity to object to the suggested restriction; (3) the court, the proponents and the objectors should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened; (4) the court must weigh the competing interests of the defendant and the public, and consider the alternative methods suggested; and (5) the order must be no broader in its ap-

plication or duration than necessary to serve its purpose. State v. Waldon (2009) 148 Wash.App. 952, 202 P.3d 325, review denied 166 Wash.2d 1026, 217 P.3d 338. Criminal Law 1226(2); Records 32

On petitioner's motion to seal vacated record of conviction for theft, trial court was required to consider and incorporate *Ishikawa* factors in conjunction with court rule governing such petitions. State v. Waldon (2009) 148 Wash.App. 952, 202 P.3d 325, review denied 166 Wash.2d 1026, 217 P.3d 338. Criminal Law 1226(2)

Records may be sealed in family law cases only when an interest is sufficiently compelling to override the public's right to the open administration of justice. In re Marriage of R.E. (2008) 144 Wash.App. 393, 183 P.3d 339. Records 32

Sealing court records under statute permitting a family court judge to close any part of the public files to protect public policy, public morals, or the interests of children requires the justification of an overriding interest. In re Marriage of R.E. (2008) 144 Wash.App. 393, 183 P.3d 339. Records 32

Proponent of the sealing of a criminal record pursuant to the Rules of General Application must make some showing of the need for sealing, and the court must weigh the competing interests for sealing against the public's interest in open access to the files. State v. C.R.H. (2001) 107 Wash.App. 591, 27 P.3d 660. Records 32

In order to be entitled to sealing of misdemeanor and gross misdemeanor convictions, defendant was required to show need for sealing. State v. Noel (2000) 101 Wash.App. 623, 5 P.3d 747, reconsideration denied. Criminal Law 1226(2)

Superior court may seal criminal records if "compelling circumstances" require sealing, after weighing merits of closure against public's interest in open access. State v. Noel (2000) 101 Wash.App. 623, 5 P.3d 747, reconsideration denied. Criminal Law 1226(2)

Desire to prevent State from learning avenues that defendant was exploring on personal restraint petition (PRP) in effort to have conviction vacated did not present compelling circumstance necessary to justify sealing of motions to authorize costs of conducting further investigation; defendant's right to fair trial was not imperiled, nor was sealing of motions necessary to prevent serious and imminent threat to any other compelling interest. In re Personal Restraint of Gentry (1999) 137 Wash.2d 378, 972 P.2d 1250, as amended. Records 32

3. Juvenile records

Court of Appeals would order verbatim reports of hearing on termination of mother's parental rights, which were recorded in public hearing and therefore not sealed below, to be sealed on appeal to shield minor children's full names from public view. In re Dependency of G.A.R. (2007) 137 Wash.App. 1, 150 P.3d 643. Infants 246

Records in court file from hearing on termination of mother's parental rights in dependency proceeding that were deemed confidential under statute, whether in nature of clerk's papers or exhibits, would remain sealed in appel-

late court during mother's appeal from termination order pursuant to general rule. In re Dependency of G.A.R. (2007) 137 Wash.App. 1, 150 P.3d 643. Infants 246

Appellate court files in juvenile dependency appeal are open to the public unless the court grants a motion to seal the files and records under GR 15 based on a statute or compelling circumstances as determined by applying the guidelines established by Seattle Times Co. v. Ishikawa (1982) 97 Wash.2d 30, 640 P.2d 716, 8 Media L. & Pol'y 1041, on remand (Wash Super Ct) 8 Media L. & Pol'y 1450. In re Dependency of J.B.S. (1993) 122 Wash.2d 131, 856 P.2d 694, 39 A.L.R.5th 849.

3.5. Public's right of access

Although the statute allowing for the vacation of a conviction grants an offender the right to state that he or she has never been convicted, it does not explicitly authorize trial courts to seal an offender's criminal court records without first considering the public's constitutional right of access. State v. Waldon (2009) 148 Wash.App. 952, 202 P.3d 325, review denied 166 Wash.2d 1026, 217 P.3d 338. Criminal Law 1226(3.1); Records 32

The public's right of access to court records is not absolute; it may be limited to protect other significant and fundamental rights, but any limitation must be carefully considered and specifically justified. State v. Waldon (2009) 148 Wash.App. 952, 202 P.3d 325, review denied 166 Wash.2d 1026, 217 P.3d 338. Records 32

4. Unsealing

Trial court in indigent's capital murder prosecution had jurisdiction to decide motion of newspaper to unseal financial documents relating to court-appointed defense costs, following defendant's filing of appeal of conviction and sentence, without seeking leave from court of appeals, inasmuch as court of appeals had not been asked to review trial court's earlier decisions to seal financial records, such that any decision of trial court to modify prior sealing orders would not relate to decision on appeal concerning conviction and sentencing. Yakima v. Yakima Herald-Republic (2011) 2011 WL 113764. Records 32

A limited intervention to revisit a prior sealing decision under the rule setting forth the grounds and procedure for requesting the unsealing of sealed records, is a proper procedure for nonparties to use in a criminal case when a trial has been completed. Yakima v. Yakima Herald-Republic (2011) 2011 WL 113764. Parties 38

Trial court's finding that murder defendant's interest in fair trial and right to counsel did not outweigh press and public's right to open justice, such that newspaper was entitled to unsealing of attorney billing records in defendant's prosecution, had tenable basis and thus was not an abuse of discretion; newspaper gave notice to defendant regarding its intent to unseal records, redaction of records was ordered to preserve any attorney work-product privilege, and defendant had received final conviction and no longer had interest in fair trial. State v. Mendez (2010) 157 Wash.App. 565, 238 P.3d 517. Records 32

Newspaper was authorized to file motion to intervene in closed murder prosecution to unseal attorney billing records relating to case, under rule provisions permitting "interested persons" to request hearing regarding sealing

or redaction of criminal case records, and for public to seek court order permitting review of sealed records in criminal cases upon proof of compelling circumstances. State v. Mendez (2010) 157 Wash.App. 565, 238 P.3d 517. Parties 40(2); Parties 46

In demonstrating a need for the closure and/or sealing of a court record, the movant should state the interests or rights which give rise to that need as specifically as possible without endangering those interests. State v. Waldon (2009) 148 Wash.App. 952, 202 P.3d 325, review denied 166 Wash.2d 1026, 217 P.3d 338. Criminal Law 1226(2); Records 32

Court order refusing to unseal records regarding older child's mental health and current therapeutic treatment, all documents related to custody and visitation, and documents related to either of the parties' two children, and sealing all future documents relating to either child, was overbroad in dissolution of marriage proceeding; record contained no apparent basis for a compelling privacy concern for parties' younger child, nothing in record suggested that redaction was considered, and order gave no regard to whether the references to children in future documents was incidental or related to a privacy concern. In re Marriage of R.E. (2008) 144 Wash.App. 393, 183 P.3d 339. Records 32

When a party moves to unseal court records that were sealed under the former rule governing the sealing of court records and the original sealing order does not conform to the current rule, it is not appropriate to apply the current standard for unsealing; rather, the proponent of unsealing should be permitted to show that under the standards of the new rule, the original order was unjustified or overbroad. In re Marriage of R.E. (2008) 144 Wash.App. 393, 183 P.3d 339. Records 32

5. Presumptions and burden of proof

If closure and/or sealing of a court record or proceeding is sought to further any right or interest besides the defendant's right to a fair trial, a serious and imminent threat to some other important interest must be shown. State v. Waldon (2009) 148 Wash.App. 952, 202 P.3d 325, review denied 166 Wash.2d 1026, 217 P.3d 338. Criminal Law 635.6(3); Records 32

An order for the sealing of court records shall apply for a specific time period, with a burden on the proponent to come before the court at a time specified to justify continued sealing. State v. Waldon (2009) 148 Wash.App. 952, 202 P.3d 325, review denied 166 Wash.2d 1026, 217 P.3d 338. Records 32

In determining whether court records may be sealed from public disclosure, the court starts with the presumption of openness. State v. Waldon (2009) 148 Wash.App. 952, 202 P.3d 325, review denied 166 Wash.2d 1026, 217 P.3d 338. Records 32

6. Findings and conclusions

In weighing the competing interests of the defendant and the public on a petition to close and/or seal court records and alternative methods for protecting the defendant's right to fair trial, the court's consideration of these

issues should be articulated in its findings and conclusions, which should be as specific as possible, rather than conclusory. State v. Waldon (2009) 148 Wash.App. 952, 202 P.3d 325, review denied 166 Wash.2d 1026, 217 P.3d 338. Criminal Law ⚿ 635.11(5); Records ⚿ 32

7. Redaction

Trial court's oral ruling and written orders denying tenant's motion to redact her full name from the record of the dismissed detainer action that was available through the superior court management information system (SCOMIS) was ambiguous as to the standard the court applied in deciding tenant's motion to redact, and thus required remand for application of the proper standard; while the court referred to the redaction of court records rule as the framework for its decision, it did not articulate that it had weighed tenant's privacy interest against the public interest. Indigo Real Estate Services v. Rousey (2009) 151 Wash.App. 941, 215 P.3d 977. Records ⚿ 32

The redaction of court records rule applied to tenant's motion to redact her full name from the record of the dismissed detainer action brought against her by landlord, and that was available through the superior court management information system (SCOMIS); SCOMIS was the primary information system for state courts, and superior courts used SCOMIS to record parties and legal instruments filed in superior court cases, to set cases in court calendars, and to enter judgment and final dispositions. Indigo Real Estate Services v. Rousey (2009) 151 Wash.App. 941, 215 P.3d 977. Records ⚿ 32

GR 15, WA R GEN GR 15

Current with amendments received through 2/15/11

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King County Local General Rule (KCLGR) 15

Westlaw

King County Superior Court LGR 15

West's Revised Code of Washington Annotated Currentness
King County
Superior Court
Local Rules of the Superior Court for King County
Local Rules Conforming to CR Rules as Required by CR 83
XIII. General Rules (Lgr)
LGR 15. Destruction, Sealing, and Redaction of Court Records

(c) Sealing or Redacting Court Records.

(1) *Motions to Destroy, Redact or Seal.* Motions to destroy, redact or seal all or part of a civil or domestic relations court record shall be presented, in accordance with GR 15 and GR 22, to the assigned judge or if there is no assigned judge, to the Seattle Chief Civil Judge for civil cases with a Seattle designation and to the Chief Judge in Kent for civil cases with a Kent designation, the Chief Unified Family Court Judge for family law cases with children, with the following exceptions.

(A) Guardianship, Trusts and Probate: (Title 11) Motions may be presented to any regularly sitting (but not a pro tem) Ex Parte and Probate Commissioner.

(B) Vulnerable Adult Protection Order: (RCW 74.04) Motions may be presented to any regularly sitting (but not a pro tem) Ex Parte Commissioner.

(C) Minor/Incapacitated Settlement: The motion shall be presented to the judicial officer who approved the minor settlement unless the judicial officer who approved the minor settlement is a pro tem commissioner, in which case the motion shall be brought before the assigned judge or any regularly sitting Ex Parte and Probate Commissioner.

(D) Name Changes Based on Domestic Violence: If no assigned judge, motion may be presented by the requesting party to any regularly sitting (but not a pro tem) Ex Parte and Probate Commissioner.

(E) Financial Source Documents, Personal Health Care Records and Confidential Reports in Title 26 Cases: In a proceeding brought pursuant to RCW 26, "financial source document", "personal health care record" and "confidential report" as defined under and submitted in accordance with GR 22 will be automatically sealed by the clerk without court order, if accompanied by the proper cover sheet. See, also, LFLR 5(c) and LFLR 11 with respect to family law court records in general.

(2) *Orders to Destroy, Redact or Seal.* Any order containing a directive to destroy, redact or seal all or part of a

court record must be clearly captioned as such and may not be combined with any other order; the clerk's office is directed to return any order that is not so captioned to the judicial officer signing it for further clarification. See also LCR 26(c), LCR 79 (d)(6), LFLR 5(c) and LFLR 11. The clerk is directed to not accept for filing and to return to the signing judicial officer any order that is in violation of this order.

(3) *Motions to Seal/Redact Filed Contemporaneously with Confidential Document(s).*

(A) Contemporaneously with filing the motion to seal, the moving party shall provide the following as working copies:

(i) the original unredacted copy of the document(s) the party seeks to file under seal to the hearing judge in an envelope for in camera review. The words "SEALED PER COURT ORDER DATED [insert date]" shall be written on the unredacted document(s). The following information shall be written on the envelope: The case caption and cause number; a list of the document(s) under review; and the words "SEALED PER COURT ORDER DATED [insert date]."

(ii) a proposed redacted copy of the subject document(s).

(iii) a proposed order granting the motion to seal, with specific proposed findings setting forth the basis for sealing the document(s).

(B) If the hearing judge denies the motion to seal, the judge will file the original unredacted document(s) unsealed with an order denying the motion. The words "SEALED PER COURT ORDER FILED [insert date]" will be crossed out on the unredacted document(s).

(C) The unredacted document(s) shall not be filed electronically. If submitted through the Clerk's Working Copies Application, the unredacted document(s) will be placed, by the Clerk's Office, in an envelope as described above.

(D) If the hearing judge grants the motion to seal, in whole or in part, the judge will file the sealed document(s) contemporaneously with a separate order granting the motion. If the judge grants the motion by allowing redaction, the judge shall write the words "SEALED PER COURT ORDER DATED [insert date]" in the caption of the unredacted document before filing.

(e) Motions to Unseal or Examine. See LCR 77(i)(11) with respect to motions to unseal or examine a sealed court record.

CREDIT(S)

[Adopted effective September 1, 2008; amended on an emergency basis effective January 1, 2009; amended on a permanent basis effective September 1, 2009; amended effective September 1, 2010; September 1, 2010.

King County Superior Court LGR 15, WA R KING SUPER CT LGR 15

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U.S. District Court, Western District
Civil Rule (CR) 5

Westlaw

C
Washington Federal Rules of Court Currentness
Rules of the United States District Court for the Western District of Washington
Civil Rules
CR 5. Serving and Filing Pleadings and Other Papers

(a) Service. Whenever the court has made an ex parte order, the party obtaining it shall serve a copy of the order, and of the papers upon which it was based, within three days after entry of the ex parte order, upon each party who has appeared in the cause; except that an order to show cause shall be served within the time fixed by the order.

(b) The court authorizes service under Fed. R. Civ. P. 5(b) by electronic means. A paper properly filed by electronic means in accordance with the court's Electronic Filing Procedures for Civil and Criminal Cases is service for purposes of Fed. R. Civ. P. 5(b). This provision does not alter Fed. R. Civ. P. 5(d); Rule 26 initial disclosures and discovery requests and responses must not be filed until they are used in the proceedings or the court orders filing. If the recipient is not a registered participant in the CM/ECF system, service of the underlying document must be made by the filer in paper form according to the Federal Rules of Civil Procedure.

(c) Reserved.

(d) Reserved.

(e) Place of Filing and Trial.

(1) In all civil cases in which all defendants reside, or in which the claim arose, in the counties of Clallam, Clark, Cowlitz, Grays Harbor, Jefferson, Kitsap, Lewis, Mason, Pacific, Pierce, Skamania, Thurston, and Wahkiakum, the case file will be maintained in Tacoma. The same criteria as set out above shall be used to determine the location of the file when cases are removed from state courts.

(2) In some circumstances, a judge of the court will order that a case which would otherwise be considered a Tacoma case under CR 5(e)(1) be assigned to a Seattle judge, and vice versa. When that happens, the files will be maintained in the city where the assigned judge maintains an office.

(f) Proof of Service. Proof of service of all filings required or permitted to be served, other than those for which a method of proof is prescribed in the Federal Rules of Civil Procedure, shall be made by a certificate or acknowledgment of service on the document itself, or by a separate filing if necessary. Failure to make the proof of service required by this subdivision does not affect the validity of the service and the court may at any time allow the proof of service to be amended or supplied unless it clearly appears that to do so would result in material prejudice to any party.

(g) Sealing of Court Records.

(1) This rule sets forth a uniform procedure for sealing documents filed with the court. Nothing in this rule shall be construed to expand or restrict statutory provisions for the sealing of documents, court files or cases.

(2) There is a strong presumption of public access to the court's files. With regard to dispositive motions, this presumption may be overcome only on a compelling showing that the public's right of access is outweighed by the interests of the public and the parties in protecting the court's files from public review. With regard to nondispositive motions, this presumption may be overcome by a showing of good cause under Rule 26(c).

(3) If a party seeks to have documents filed under seal and no prior order in the case or statute specifically permits it, the party must obtain authorization to do so by filing a motion to seal or a stipulation and proposed order requesting permission to file specific documents under seal. The court will allow parties to file entire memoranda under seal only in rare circumstances. A motion or stipulation to seal usually should not itself be filed under seal. A declaration or exhibit filed in support of the motion to seal may be filed under seal if necessary. If possible, a party should protect sensitive information by redacting documents rather than seeking to file them under seal. A motion or stipulation to seal should include an explanation of why redaction is not feasible.

(4) A motion or stipulation to seal shall provide a specific description of particular documents or categories of documents a party seeks to protect and a clear statement of the facts justifying sealing and overcoming the strong presumption in favor of public access. The facts supporting any motion or stipulation to seal must be provided by declaration or affidavit.

(5) A motion or stipulation to seal may either be filed prior to or contemporaneously with a filing that relies on the documents sought to be filed under seal. If the court subsequently denies the motion to seal, the sealed document will be unsealed unless the court orders otherwise, or unless the party that is relying on the sealed document, after notifying the opposing party within three days of the court's order, files a notice to withdraw the documents. If a party withdraws a document on this basis, the parties shall not refer to the withdrawn document in any pleadings, motions and other filings, and the court will not consider it. For this reason, parties are encouraged to seek a ruling on motions to seal well in advance of filing underlying motions relying on those docu- ments.

(6) Files sealed based on a court order shall remain sealed until the court orders unsealing upon stipulation of the parties, motion by any party or intervenor, or by the court after notice to the parties. Any party opposing the unsealing must meet the required showing pursuant to 5(g)(2) that the interests of the parties in protecting files, records, or documents from public review continue to outweigh the public's right of access.

(7) For those parties (e.g., pro se) who are exempt from the otherwise mandatory electronic filing requirement, each document to be filed under seal must be submitted in hard copy and submitted in a separate envelope, clearly identifying the enclosed document and stating that the document is "FILED UNDER SEAL." For example, if both the motion and the accompanying affidavit should be filed under seal, the two documents must be submitted in separate, clearly marked envelopes so that each may be entered on the docket. If only one exhibit or

document needs to be filed under seal, only that exhibit or document should be submitted in an envelope.

CREDIT(S)

[Effective May 1, 1992. Amended effective July 1, 1997; December 1, 2000; January 1, 2002; January 1, 2009; December 1, 2009.]

U. S. Dist. Ct. Rules W.D.Wash., CR 5, WA R USDCTWD CR 5

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kathryn Ross, Leo Hamaji and William Prestia, the attorneys for the appellant, at 810 3rd Avenue, Suite 800, Seattle, WA 98104-1695, containing a copy of the Brief of Respondent, in STATE V. JOSEPH MCENROE, Cause No. 86084-0, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

C Brame
Name

10/14/11
Date

Done in Seattle, Washington

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Colleen O'Connor and David Sorenson, the attorneys for Michele Anderson, at 1401 E. Jefferson St., Suite 200, Seattle, WA 98122-5570, containing a copy of the Brief of Respondent, in STATE V. JOSEPH MCENROE, Cause No. 86084-0, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Name

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Date

Done in Seattle, Washington